Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1996

DARSON H. PERSYN, CLOTILDE PERSYN,
FLORENT BAECKE, MILDRED V. BAECKE, ET AL

Petitioners

v.

THE UNITED STATES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX VOLUME II
Appendix D, E, F, G, ,H, I, J

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18 pp

APPENDIX D

UNITED STATES COURT OF APPEALS
for the FEDERAL CIRCUIT

96-5033

DARSON H. PERSYN, CLOTILDE PERSYN, FLORENT BAECKE MILDRED V. BAECKE, PAUL PERSYN, ERMA PERSYN, RAUL JIMENEZ, SR., AVIEL L. BROEKHOVE, JOSIE A. BROEKHOVE, CELESTE PERSYN WORRICK, Indv. and as Ind. Exec. of Est. of LEONA PERSYN, Dec'd, RICHARD PERSYN, GABRIEL THIENPONT, EMMA PERSYN, MARY ROSENBUSH, MARGARET MILAM, HORTENSE BROEKHOVE, 4M PROPERTIES, INC., SOMERSET ROAD JOINT VENTURE, PHIL M. BROEKHOVE, EMIEL P. BROEKHOVE, REMI AELVOET, MARSHALL AELVOET, RICHARD AELVOET, IRMA PERSYN, ELSIE AELVOET VERELST, ALINE WAUTERS, RAYMOND WAUTERS, LORRAINE WAUTERS, GEORGE VERSTUYFT, IRMA VERSTUYFT, ROBERT VERSTUYFT, RAYMOND VERSTUYFT, NORMAN VERSTUYFT, MARGARET VERSTUYFT, ROGER VERSTUYFT, PATRICIA VERSTUYFT, CLARA VERSCHELDEN, ALENE BUYS, CLARA VERSTUYFT PERSYN, HENRY VERSTUYFT, JULIANA V. VERSTUYFT, HOMER VERSTUYFT, YVONNE VERSTUYFT, J.C. LOPEZ, MARGARET G. BROWN, HELAMAN R. DURAN, IRENE L. DURAN, HENRY B. GARCIA, ROSIE R. GARCIA, ELOY CENTENO, MARGARET THIENPONT, ALINE OYER, MARIE DECOCK, ROBERT CADENA, JOHN MILLER, COMCAL GROUP, J.L. GUERRA, HERMINA L. GUERRA,

CLOTILDE PERSYN, Ind. Exec. of Est. of DARSON H. PERSYN, Dec'd., FRANK PERSYN, HENRY JOE PERSYN, LESLIE ANN PERSYN, LORRAINE STEUBING, LAURA PERSYN, Successors In Title to EMMA PERSYN, Dec'd, SOMERSET ROAD JOINT VENTURE, Acting by and through its members TERRY BRITTON, MARTIN WEISS, and MICHAEL WEISS, MARIE AELVOET, Devisee of REMI AELVOET, RAYMOND WAUTERS, Successor In Title to ALINE WAUTERS, Dec'd, IRMA VERSTUYFT, Ind. Exec. of Est. of GEORGE VERSTUYFT, Dec'd, MICHAEL RAYMOND VERSTUYFT, GARY EDWARD VERSTUYFT, DAVID ALPHONSE VERSTUYFT, RICHARD JOHN VERSTUYFT JULIA LOUISE VERSTUYFT, SHIRLEY P. VERSTUYFT, Successors In Title to RAYMOND VERSTUYFT, Dec'd, EUNICE VERSTUYFT, Indiv. and as Ind. Exec.of ROBERT VERSTUYFT, Dec'd, EDWARD C. VERSTUYFT, JOHN D. VERSTUYFT, MARIE DURST, MARVIN VERSTUYFT, SHARON ELAINE EISENHAUER, MILDRED BAECKE and ALENE BUYS, As Successors to CLARA VERSCHELDEN, Dec'd, GEORGE BROWN, II, MARY ALICE PONS, RICHARD BROWN, DANIEL BROWN, MARGARET ROSE BROWN, Successors In Title To GEORGE BROWN, Dec'd. Estates of JOE CENTENO, SR., Dec'd and JESUSA CENTENO, Dec'd, Their Devisees and Heirs ELOY CENTENO, LILY CENTENO ALFONSIN, ALICE B. CENTENO LITTLE, CHARLES CALDANA, CARMEN GARCIA and ROLAND NAUMANN, Co-Administrators with Wills Annexed, J.L. GUERRA, JR. Ind. Exec. of Est. of J.L. GUERRA, SR. Dec'd.,

Appeal from a Judgment of the United States Court of Federal Claims in 91-1535L entered September 27, 1995, Judge Moody R. Tidwell.

JUDGMENT

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: **AFFIRMED**

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly

Jan Horbaly, Clerk

DATED: DECEMBER 27, 1996

ISSUED AS A MANDATE: February 18, 1997

COSTS: Against, Appellants.

PRINTING.....$175.25

TOTAL.....$175.25

APPENDIX E

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
for the FEDERAL CIRCUIT

96-5033

DARSON H. PERSYN, CLOTILDE PERSYN, FLORENT BAECKE MILDRED V. BAECKE, PAUL PERSYN, ERMA PERSYN, RAUL JIMENEZ, SR., AVIEL L. BROEKHOVE, JOSIE A. BROEKHOVE, CELESTE PERSYN WORRICK, Indv. and as Ind. Exec. of Est. of LEONA PERSYN, Dec'd, RICHARD PERSYN,GABRIEL THIENPONT, EMMA PERSYN, MARY ROSENBUSH, MARGARET MILAM, HORTENSE BROEKHOVE, 4M PROPERTIES, INC., SOMERSET ROAD JOINT VENTURE, PHIL M. BROEKHOVE, EMIEL P. BROEKHOVE, REMI AELVOET, MARSHALL AELVOET, RICHARD AELVOET, IRMA PERSYN, ELSIE AELVOET VERELST, ALINE WAUTERS, RAYMOND WAUTERS, LORRAINE WAUTERS, GEORGE VERSTUYFT, IRMA VERSTUYFT, ROBERT VERSTUYFT, RAYMOND VERSTUYFT, NORMAN VERSTUYFT, MARGARET VERSTUYFT, ROGER VERSTUYFT, PATRICIA VERSTUYFT, CLARA VERSCHELDEN, ALENE BUYS, CLARA VERSTUYFT PERSYN, HENRY VERSTUYFT, JULIANA V. VERSTUYFT, HOMER VERSTUYFT, YVONNE VERSTUYFT, A.C. LOPEZ, MARGARET G. BROWN,

HELAMAN R. DURAN, IREME L. DURAN, HENRY B. GARCIA, ROSIE R. GARCIA, ELOY CENTENO, MARGARET THIENPONT, ALINE OYER, MARIE DECOCK, ROBERT CADENA, JOHN MILLER, COMCAL GROUP, J.L. GUERRA, HERMINA L. GUERRA, CLOTILDE PERSYN, Ind. Exec. of Est. of DARSON H. PERSYN, Dec'd., FRANK PERSYN, HENRY JOE PERSYN, LESLIE ANN PERSYN, LORRAINE STEUBING, LAURA PERSYN, Successors In Title to EMMA PERSYN, Dec'd, SOMERSET ROAD JOINT VENTURE, Acting by and through its members TERRY BRITTON, MARTIN WEISS, and MICHAEL WEISS, MARIE AELVOET, Devisee of REMI AELVOET, RAYMOND WAUTERS, Successor In Title to ALINE WAUTERS, Dec'd, IRMA VERSTUYFT, Ind. Exec. of Est. of GEORGE VERSTUYFT, Dec'd, MICHAEL RAYMOND VERSTUYFT, GARY EDWARD VERSTUYFT, DAVID ALPHONSE VERSTUYFT, RICHARD JOHN VERSTUYFT JULIA LOUISE VERSTUYFT, SHIRLEY P. VERSTUYFT, Successors In Title to RAYMOND VERSTUYFT, Dec'd, EUNICE VERSTUYFT, Indiv. and as Ind. Exec.of ROBERT VERSTUYFT, Dec'd, EDWARD C. VERSTUYFT, JOHN D. VERSTUYFT, MARIE DURST, MARVIN VERSTUYFT, SHARON ELAINE EISENHAUER, MILDRED BAECKE and ALENE BUYS, As Successors to CLARA VERSCHELDEN, Dec'd, GEORGE BROWN, II, MARY ALICE PONS, RICHARD BROWN, DANIEL BROWN, MARGARET ROSE BROWN, Successors In Title To GEORGE BROWN, Dec'd. Estates of JOE CENTENO, SR., Dec'd and JESUSA CENTENO, Dec'd, Their Devisees and Heirs ELOY CENTENO, LILY CENTENO ALFONSIN, ALICE B. CENTENO LITTLE, CHARLES CALDANA, CARMEN GARCIA and ROLAND

NAUMANN, Co-Administrators with Wills Annexed, J.L. GUERRA, JR, Ind. Exec of Est. of J.L. GUERRA, SR. Dec'd.,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: December 27, 1996

Before ARCHER, *Chief Judge.* NEWMAN and MICHEL, *Circuit Judges.*
MICHEL, *Circuit Judge.*

Persyn, et al., appeal the orders of the Court of Federal Claims: (1) holding that the Court of Federal Claims had jurisdiction and denying Persyn's motion to "remand"[1] to the United States District Court for the Western District of Texas.

Persyn v. United States, No. 91-1535L (Court of Federal Claims, filed Jan. 4, 1995); (2) granting partial summary judgment to the United States ("government") dismissing Persyn's claim for a regulatory taking, *Persyn v. United States,*

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[1] The plaintiffs moved for "remand" to the district court, but the Court of Federal Claims properly treated the motion as one for transfer. It is the denial of the transfer which we affirm.

32 Fed. Cl. 579 (1995) ("Persyn I"); and (3) granting the government's motion for Judgment on Partial Findings and dismissing the complaint, *Persyn v. United States,* 34 Fed. Cl. 187 (1995) ("*Persyn II*"). The appeal was submitted for our decision following oral argument on November 13, 1996. Because we agree that the appellants' takings claims are time barred, and also agree with the dismissal of apellants' other claims, we *affirm.*

BACKGROUND

The facts of this case are set out in detail in *Persyn II,* 34 Fed. Cl. at 190-191. In short, appellants are the owners of 35 tracts of land adjacent to or near the Kelly Air Force Base ("Kelly AFB") in San Antonio, Texas. Kelly AFB has been in continuous operation as an Air Force base since 1917. Persyn sued the United States seeking over $16 million in damages, alleging physical takings under the Fifth Amendment of their properties resulting from overflights of the government's aircraft. They also asserted regulatory takings of their property through the promulgation of Department of Housing and Urban Development ("HUD") regulations and through the passage of related zoning and land-use ordinances by the City of San Antonio.

The government was granted partial summary judgdment on some of the issues. After a three day trial on the remaining physical takings issue, including arguments and evidence regarding the statute of limitations, the Court of Federal Claims issued an order with opinion granting judgment on partial findings in favor of the United States. The court held that the claims were time barred and rejected Persyn's argument that noise level from overflights must "stabilize" before any cause of action accrues.

DISCUSSION

1.

Appellants claim avigation easements by physical taking from overflights of aircraft into and out of Kelly AFB. An overflight avigation easement taking is established by proof of three elements: (1) the aircraft flights must be directly over the property; (2) the flights must be low and frequent; and (3) the flights must substantially interfere with the use and enjoyment of the property. *United States v. Causby,* 328 U.S. 256, 266 (1946); *A.J. Hodges Indus., Inc. v. United States,* 355 F.2d 592, 595 (Ct. Cl. 1966). Furthermore, a claim must be brought in a timely fashion: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (1994). Appellants filed their claim July 15, 1988. The critical date for statute of limitation purposes is therefore July 15, 1982.

The government argued below, and the trial court held, that appellants' causes of action accrued prior to 1982 and thus their claims were barred. Appellants argue that the trial court erred because the causes of action did not accrue until the interference had "stabilized." They cite *Applegate v. United States* 25 F.3d 1579 (Fed. Cir. 1994), in support of this argument. In *Applegate,* this court decided that the cause of action for a taking via a gradual erosion of land did not accrue until it was clear how much erosion would take place—that is, until the erosion had stabilized. In reaching its decision, the *Applegate* court relied on *United States v. Dickinson*, 331 U.S. 745 (1947). *Dickinson* involved the building of

a dam which caused intermittent flooding of the plaintiffs' land. 331 U.S. at 746-47. The Supreme Court held that the plaintiffs could delay filing suit until the full extent of the damage was clear. *Id.* at 749. The policy in *Applegate, Dickinson,* and other "stabilization" cases is to avoid piecemeal litigation and the res judicata risks to plaintiffs attendant to piecemeal litigation. The *Dickinson* stabilization doctrine has been applied in the avigation easement context. *Avery v. United States,* 330 F.2d 640, 643 (Ct. cl. 1964) (holding that a "new and further taking" had occurred when "greater noise, greater inconvenience and a further reduction of land values' were caused by increased operations and new aircraft introductions."); *Aaron v. United States,* 311 F.2d 798, 800-01 (Ct. Cl. 1963) ("Before that time [that the Air Force started making test flights, the plaintiffs] were uncertain just how serious the impairment would be or how long it would continue. Before that time we do not think the statute of limitations had begun to run . . . ."); *Klein v. United States,* 152 Ct. Cl. 221, 223-24 (1960) ("where at the outset it was not known to what extent the jet planes would pass over the property and, hence, whether or not the condition would become intolerable, plaintiffs' cause of action had not fully accrued and did not fully accrue until such conditions had come to pass or the extent of the use and the consequent interference with plaintiffs' use and enjoyment of their property was known or ascertainable").

Apellants argue that their causes of action accrued well after the 1982 critical date because noise levels did not stabilize until 1985. However, the law is clear that stabilization of the noise level is not dispositive. Rather, the dispositive issue is when the noise level reached an intolerable level and resulted in a taking. We agree with the

Court of Federal Claims that the general principle of *Dickinson* applies: "a claim for taking based on continuing acts of physical invasion does not accrue until the extent of the invasion and the degree of the interference is known or should be known." *Persyn II,* 34 Fed. Cl. at 197 (citing *Aaron,* 311 F.2d at 801). We further agree with the trial court that "the extent of the invasion and the degree of interference is ascertainable when the United States *begins* to operate its aircraft at low elevation and with such frequency that they substantially interfere with the use and enjoyment of the land, with the intent to continue such flights indefinitely." *Id.* (citing *A.J. Hodges,* 355 F.2d at 596).

After trial, the Court of Federal Claims found that there was substantial interference with the use and enjoyment of each of the parcels before 1981. Based on the evidence adduced at trial, we cannot hold that this finding was clearly erroneous. Since the causes of action accrued before the critical date, appellants' claims are time barred.

II.

We have carefully considered appellants' arguments regarding jurisdiction, the application of Texas law, and regulatory takings, and we affirm the rulings of the trial court for the reasons set forth in the trial court's orders.

APPENDIX E

(28 U.S.C., Jurisdiction, Court of Federal Claims)

§ 1500. Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

APPENDIX F

(32 CFR Part 256, "Air Installation Compatible Use Zones," Department of Defense)

§256.4 Policy.

(a) *General.* As a first priority step, all reasonable, economical, and practical measures will be taken to reduce and/or control the generation of noise from flying and flying related activities. Typical measures normally include siting of engine test and runup facilities in remote areas if practical, provision of sound suppression equipment where necessary, and may include additional measures such as adjustment of traffic patterns to avoid built-up areas where such can be accomplished with safety and without significant impairment of operational effectiveness. After all reasonable noise source control measures have been taken, there will usually remain significant land areas wherein the total noise exposure is such as to be incompatible with certain uses.

(b) *Compatible use land*—(1) *General.* (1) DoD policy is to work toward achieving compatibility between air installations and neighboring Civilian communities by means of a compatible land use planning and control process conducted by the local community.

(2) *Property rights acquisition*—(1) *General.* While noise generated by aircraft at military air installations should be an integral element of land use compatibility efforts, the acquisition of property rights on the basis of noise by the Department of Defense may not be in the long term best

interests of the United States. Therefore, while the complete requirement for individual installations should be defined prior to any programming actions, acquisition of interests should be programmed in accordance with the following priorities.

(A) *Priorities.* (A) The first priority is the acquisition in fee and/or appropriate restrictive easements of lands within the clear zones whenever practicable.

(B) Outside the clear zone, program for the acquisition of interests, first in Accident Potential Zones and secondly in high noise areas only when all posibilities of achieving compatible use zoning, or similar protection, have been exhausted and the operational integrity of the air installation is manifestly threatened. if programming actions are considered necessary, complete records of all discussions, negotiations, testimony, etc. with or before all local officials, boards, etc. must be maintained. This will ensure that documentation is available to indicate that all reasonable and prudent efforts were made to preclude incompatible land use through cooperation with local governmental officials and that all recourse to such action has been exhausted. Such records shall accompany programming actions and/or apportionment requests for items programmed prior to the date of this part. In action, a complete economic analysis and assessment of the future of the installation must be included.

APPENDIX G

(24 CFR Part D, "Environmental Criteria and Standards" Department of Housing and Urban Development)

Subpart D—Siting of HUD Assisted Projects in Runway Clear Zones of Civil Accident Potential Zones at Military Airfields.

Source: 49 FR 880. Jan. 6, 1984, unless otherwise noted.

§51.300 Purpose.

(a) The Department of Housing and Urban Development finds that HUD assisted or insured projects and their occupants in Runway Clear Zones, Clear Zones and Accident potential Zones are exposed to a significant risk of personal injury or property damage from aircraft accidents.

(b) It is the purpose of this subpart to promote compatible land uses around civil airports and military airfields by identifying suitable land uses for Runway Clear Zones at civil airports and Clear Zones and Accident Potential Zones at military airfields and by establishing them as standards for providing HUD assistance, subsidy or Insurance.

§51.303 General Policy.

It is HUD's general policy to apply standards to prevent incompatible development around civil airports and military airfields.

(a) HUD policy for actions in Runway Clear Zones and Clear Zones.

(1) HUD policy is not to provide any assistance,

subsidy or insurance for projects and actions covered by this part except as stated in §51.303(a)(2) below.

(2)If a project proposed for HUD assistance, subsidy or insurance is one which will not be frequently used or occupied by people. HUD policy is to provide assistance, subsidy or insurance only when written assurances are provided to HUD by the airport operator to the effect that there are no plans to purchase the land involved with such facilities as part of a Runway Clear Zone or Clear Zone acquisition program.

(3) Special notification requirements for Runway Clear Zones and Clear Zones. In all cases involving HUD assistance, subsidy, or insurance for the purchase or sale of an existing property in a Runway Clear Zoneor Clear Zone. HUD (or the Grant Recipient under title I of the Housing and Community Development Act of 1974, as amended, 42 U.S.C. 5301 *et seq.*) shall advise the buyer that the property is in a Runway Clear Zone or Clear Zone, what the implications of such a location are, and that there is a possibility that the property may, at a later date, be acquired by the airport operator. The buyer must sign a statement acknowledging receipt of this information.

(b) HUD policy for action in Accident Potential Zones at Military Airfields. HUD policy is to discourage the provision of any assistance, subsidy or insurance for projects and action in the Accident Potential Zones. To be approved, projects must be generally consistent with the recommendations in the *Land Use Compatibility Guidelines For Accident Potential Zones* chart contained in DOD Instruction 4165.57, 32 CFR part 256.

APPENDIX H

(28 U.S.C. § 1346, Jurisdiction, District Court)

(f) The district courts shall have exclusive original jurisdiction of civil action under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

APPENDIX I

(28 U.S.C., Rules of Decision Act)

§ 1652. State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

(June 25, 1948, c. 646, 62 Stat. 944.)

APPENDIX J

(U.S. Const., Amend. 5, Taking Clause)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.